

*Law & Justice in a New Land: Essays in Western Canadian Legal History*, ed. Louis A. Knafla. Calgary: Carswell, 1986. Pp. xvii, 379.

Overheard at a Carswell's display recently, a distinguished academic lawyer with an international reputation, upon seeing this book: "Now, that is something new!" He clearly was not amazed at the title, that law and justice might be novel to any new land; rather, he appeared dumbfounded by the sub-title's suggestion that western Canada possessed any legal history at all. It's not old enough or instructive enough!

That may help to explain why, in fact, there has been so little legal history here. (Eastern Canada can explain its own dearth in its own way!) The primary point is that the makers of legal history — the litigants, lawyers, legislators, judges, and police — work in a world that thinks one case at a time. Most have yet to see any need for synthetic studies of what they and their predecessors have accomplished. Second, the doers of legal history — the academic, popular, antiquarian, even journalistic writers — have been too thin on the ground. Rewards are few and the competitive distractions for their leisure are too many. Those who venture into doing legal history often become intimidated by original legal evidence that can be technically daunting and inaccessible. Third, the gatherers of legal history — specifically librarians, archivists, and records managers — have only recently arrived professionally to expedite research problems.

None of this suggests some magical minimum age after which any land can begin to have a legal history. Societies will have it whenever they work at it and support those willing to gather and do it. In fact, without legal history we remain only technocrats, groping from case to case, relying on intuition rather than reason, never pausing to reflect or understand the law and legal systems we inherit and bequeath.

Still, who needs legal history? This collection of essays, truly a first for Western Canada, goes a long way toward answering that question. It complements the Ontario orientation that David Flaherty's two excellent volumes offer (1981, 1983), under Osgoode Society sponsorship. This book's support came mainly from the Alberta Law Foundation and the University of Calgary. It originated there at a conference (25-27 April 1984), organized by Professors Louis A. Knafla (History) and John P. S. McLaren (Law). All but two of the nine papers given there are published here; and five other essays, including a most helpful bibliography for Western Canadian legal history (by Dr. Janice Dickin McGinnis), have been added. So we have here a most professional introduction to our

subject, with reader access aided by careful indexes and a good choice of maps and photographs.

Graham Parker sets a broad scene by trying to define "Canadian Legal Culture" in the first essay. That word culture always raises more problems than it covers, just as the older word *zeitgeist* did and as the currently fashionable *mentalité* does. These words urge a vocabulary that sucks spirit out of reality, launching language into an ether of symbolism, concepts, values, motives, and (heaven help us!) feelings. Apply this to law and we end up with disembodied talk of themes, trends, and traditions, where there are no disputants, remedies, rules, and courts. At its worst, this sort of "history of ideas" never bothers with first doing the hard structural and substantive reconstructions of past laws and past legal systems. Fortunately Parker neither creates nor chases such legal chimeras, probably because he is brought to earth by the need to define what is "Canadian" in our legal culture. He paints a good synthetic portrait of "colonial governors and judges," gives a sharp lawyer's view of "the cultural cringe" (being Canada's preference for "English precedent over its own"), and then measures the impact on law made by "the myth of the Mounties" and by "the triumph of discretionary justice." Everyone will be impressed by Parker's reading range and witty, gritty way of playing with vital legal issues. As Parker's postscript admits, the essay remains "Ontario-centric," but that should make it all the more provocative for westerners.

The remaining ten essays are admirably anchored in western issues and evidence. Appropriately, the person who inspired this enterprise, then organized and edited the book itself, has contributed its most central and synthetic essay. Louis Knafla has always been a doer, a no-nonsense scholar who has probably forgotten more law and history than most of us will ever know. Here he offers a forty-seven page summary that should be required reading for all lawyers and students, entitled "From Oral to Written Memory: the Common Law Tradition in Western Canada." It is a swift survey for the nineteenth century's spread of settlers' law, first in Assiniboia, then in British Columbia and the Prairies. Knafla next identifies a series of fascinating characteristics in the common law on the frontier: the adaptability of Common Law as Municipal Law, the tenacity of judges for a Rule of Law, struggles for Judicial Independence, provincial identification with Royal Prerogative vis-à-vis expanding federalism, and finally an all too brief mention of Fundamental Law in the thinking of settlers and natives. Much of this Knafla consciously borrows from English legal history, making it a general mold imposed on all the other essays to give an overall shape to the book. He in fact has little to

say about the "oral memory" suggested by his title (for which, see Michael Clanchy's book, 1979), so his evidence is entirely literal and that of the settlers. But this does not detract from the substantial survey that he provides.

Explorers, traders, and first settlers in western Canada needed neither law nor military might. Until the 1890s they remained outnumbered by the many scattered, pliant bands and families of native Indians. To their credit, neither Europeans nor Indians tried to even their scores by force, as did their U.S. neighbours. This did not necessarily mean that either or both resorted to law, as the routine for resolving disputes and punishing criminals. Order took priority over law, both before and after the treaty phases had tried to balance the rights of Indians with the realities of settlement. By 1900, as three superb essays in this book make clear, only the ambiguities and contradictions were in place, concerning "Aboriginal and Indian Rights."

All three authors are sympathetic to an existence of Indian rights and each speaks largely to British Columbia. Thomas Flanagan sets out three models for argument: (1) "that natives constituted sovereign nations . . . endowed with full ownership of the land" and treaty-making status; or, (2) "the positivistic view that natives have only such rights to land as are explicitly granted to them by the sovereign;" or, (3) that "aboriginal title [exists only] as a usufructuary right of occupancy." Douglas Sanders, in "The Queen's Promises," examines *R. v. Wesley* (1932) and *R. v. Samson* (1957), two Alberta cases that set the stage for modern "politicization and litigation of Indian rights questions." The third essay, "Indian Resource Rights and Constitutional Enactments in Western Canada, 1871-1930," by Nigel Bankes, offers a meticulous, lawyer's reconstruction of the law, based on a broad variety of original evidence.

The next three essays are rooted in British Columbia's records and mark the high point of interest for provincial readers. Each is written by an experienced professional. Hamar Foster builds a solid base for the B.C. Supreme Court, 1871-85, with his reconstruction of the Thrasher case. David Williams applies his keen eye and lively pen to "The Administration of Criminal and Civil Justice in the Mining Camps and Frontier Communities of British Columbia" during the late 1850s and 1860s. Then Wilbur Bowker examines "The Sproule Case: Bloodshed at Kootenay Lake, 1885," which monopolizes 110 pages in the Supreme Court of Canada Reports. All three essays are less testimony to the roughness of frontier justice than to the adaptability of English common law process. And all three also make good stories well told.

This collection ends with three shorter essays that focus on social dimensions to applied law in Alberta. Each relies heavily on legal archives, when analyzing the uses and abuses of law with regard to "Male Homosexuality . . . 1890-1920" (written by Terry Chapman), "Female Crime in Calgary, 1914-1941" (by Elizabeth Langdon), and "Urban Relief . . . 1930-1937" (by Peter Sibenik). The former luridly details anecdotal evidence for vaguely, ambiguously defined offences in law; and the latter shows how precisely defined laws could be made flexible in the face of mounting social pressures during "the Depression."

Professor Knafla and these contributors have now given us a start. It remains to western Canada's lawyers and informed laity to try the book and to judge it for the understanding it offers. Let no one be surprised that western Canada's legal history has an abundance of valuable lessons, laughs, victims, and laudable characters. The evidence from our courts, police, correction services, and legal profession awaits anyone willing to turn their hands and mind to making sense of our system.

*University of British Columbia*

DELLLOYD J. GUTH

*Vancouver: Soul of a City*, edited and with an Introduction by Gary Geddes. Vancouver: Douglas & McIntyre, 1986. Pp. 328.

*Vancouver: Soul of a City* is a beautiful book, well made, designed and printed. But it is more than beautiful; it is a richly interesting collection of literary and para-literary responses to Vancouver by some of Canada's leading writers and a number of lesser known figures whose poems, essays, or stories provide a breadth and perspective not usually found in anthologies.

But before I go on to say what *Vancouver: Soul of a City* is and what can be found within its covers, let me first suggest what this collection is *not*. It is not an awed *festschrift* on the occasion of Vancouver's centenary; it is *not* a miscellany bubbling with serendipity and mindless optimism; it is *not* a selection of all the pretty things that might be or (have been) said about "supernatural British Columbia"; it is *not* Expo '86 propaganda! If you want a coffee table hard-back singing the praises of Sacred B.C., of Indian crafts, fantastic gardens and the glories of urban development, a kind of verbal, glossy advertising gimmick, do not buy this book.

What this book does offer is far more valuable, and it is for this reason that I put it ahead of various books hastily assembled for Vancouver's